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No. 72-633

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

COPELAND REFRIGERATION CORPORATION,
Petitioner,

v.

WARRINER HERMETICS, INC.,
AND WARRINER PARTS, INC.,
Respondents.

Answer To Petition For A Writ Of Certiorari

WINFRED HOOPER, JR.
DAVID F. CHAPPELL
200 Fort Worth Club Building
Fort Worth, Texas 76102

Of Counsel
HOOPER, KERRY, CHAPPELL & BROILES

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QUESTIONS PRESENTED

Whether the Fifth Circuit accurately described the proper method of submitting *per se* antitrust violations to the jury, under the usual Texas federal practice.

Whether the Fifth Circuit's remand of the case for new trial is supported by any one of twenty points of error raised in the Fifth Circuit.

STATEMENT

Significant aspects of this case were omitted from discussion or were, at the least, underemphasized by Petitioner. First, and of primary importance, were the jury findings on the relevant line of commerce in the case. Although Petitioner seeks to focus attention on the sale of new compressors to original equipment

manufacturers and franchised wholesalers, Warriner Hermetics and Parts compete with Petitioner only in the lines of commerce in the *replacement* field. The jury found the relevant lines of commerce to be "sale of rebuilt commercial refrigeration compressors" and "sales of replacement parts for commercial refrigeration compressors" (Special Issue 1). The arena of foreclosed competition to Respondent, a rebuilder, is the independently owned Copeland franchised wholesalers and Copeland franchised rebuilders.

To secure the Copeland franchise and the *patented* new Copeland compressor, the wholesaler must agree to purchase its rebuilt Copeland compressors from Copeland or its franchised rebuilders. In order to secure a Copeland franchise as a rebuilder, and, thereby a captive set of 200 franchised wholesalers, those independently owned rebuilders agreed to buy all of their parts from Copeland and agreed not to resell them, except in the rebuilt product. In addition, the three franchised rebuilders must sell their rebuilt Copeland compressors only to specified franchised wholesalers at a fixed price. Copeland carefully placed these agreements in writing, and it was undisputed and stipulated that the restrictive practices were followed absolutely.

In spite of these restrictive agreements and after many years of attempted sales, Warriner, because of its lowered price and superior warranty, convinced one franchised wholesaler, Thermal, with 21 locations in Texas and Louisiana, to enter into an agreement to rebuild Copeland compressors. Immediately upon

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discovery, Copeland threatened cancellation of Thermal's franchise, whereupon Thermal cancelled its rebuilding orders for Copeland compressors with Warriner pursuant to Copeland's instructions. Copeland also ordered and secured the agreements of its southwestern rebuilder (Aircondex) to lower its fixed price to match Warriner.[1] These facts were undisputed and stipulated by Petitioner.

Petitioner likewise omits significant statements concerning the nature of the Copeland franchise. As the Fifth Circuit stated, "The one year warranty which it [Copeland] extends on its product is available only through its franchised wholesalers." 463 F.2d at 1015. This warranty system certainly creates a natural channel of non-warranty business by servicemen, who already are returning the "in warranty" compressors to the franchisee. In addition the date of manufacture or rebuilding is hidden in a code on the compressor, which the great bulk of servicemen do not understand. Even if the code is understood, it may not govern, as the date of sale prevails over the date of manufacture for warranty purposes. Logically enough the serviceman must bring this compressor to the franchisee to determine whether a warranty applies or not.

Further, as the Fifth Circuit pointed out, the Copeland wholesaler who carried the prescribed inventory receives a 5% yearly credit, a direct financial benefit aiding the wholesaler in a non-warranty replacement field as an attribute of the franchise.

The receipt of a franchise to a rebuilder is highly

[1]No such drop occurred outside the Southwest.

regarded as a competitive advantage in the rebuilding field. 463 F.2d at 1015. The fact that the captive 200 franchised wholesalers must purchase their rebuilt compressors from the franchised rebuilder, clearly and manifestly supports the Court's opinion that the franchise to a rebuilder is indeed very valuable. Likewise, Copeland agrees to provide a large supply of used compressors, which, the record reflects, are not generally available.

These facts together with Copeland's advertising costs for image building creates a valuable trademark both in the wholesale and rebuilding field.

REASONS FOR DENYING THE WRIT

Although the purpose of the Fifth Circuit's opinion was to discuss the doctrinal accuracy of the method of submitting *per se* antitrust violations to the jury, under the peculiar Texas hybrid of special issues (463 F.2d at 1007), the Petitioner chose to attack the opinion on a very limited basis by claiming that no tie-in occurred between the Copeland franchise and the product sold by its franchised wholesalers and rebuilders. Not only is Petitioner in error in its analysis of the thrust of the Court's opinion, but it is also in error in stating no tie-in occurred requiring *per se* treatment.

1. Incredibly Petitioner first maintains there is no difference between the Copeland trademark and the Copeland compressor. During the trial, from opening arguments through final arguments, Petitioner sought to justify all the anti-competitive practices set out above by claiming that the purpose was to protect

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Copeland's good trademark. Now, on appeal, Copeland changes its attack and states there is no distinction between its product and its trademark.

The Fifth Circuit properly determined the value of the Copeland franchise to the wholesaler. The franchisee is the sole source of the warranty replacement (463 F.2d at 1015), creating a natural flow of non-warranty business back to the franchisee, especially in light of the serviceman's difficulty in determining whether the one year warranty applies or not. If the franchise were not valuable separately from the Copeland compressor, then why was Petitioner so successful in intimidating its franchisee Thermal into cancelling the contract with Warriner to rebuild Copeland compressors? If the compressor were the only value, then Warriner's cheaper price and better warranty would have logically prevailed as the source of supply.

To deny the value of the Copeland trademark separate from its new compressor, is to deny the high rise in image selling throughout the United States. The policy against tie-in arrangements clearly fits the tie that exists here between the Copeland franchise and the rebuilt Copeland compressors. The franchise, with its unique warranty, advertising, and exclusive territory attributes, is clearly of sufficient value to coerce the franchisee to purchase rebuilt Copeland compressors from Copeland designated sources. This tying of unique activity to a second item is what the Sherman Act forbids. *Fortner Enterprises, Inc. vs. United States Steel Corp.*, 394 U.S. 495 (1969); *Advance Systems & Supply Co. vs. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cert denied, 397 U.S. 920.

The irony of Petitioner's argument comes from the realization of where Copeland is left if the argument is successful. The jury found the rebuilt Copeland compressors to be a separate line of commerce. If the franchise and the new Copeland compressor are merged as one item, then the Petitioner is guilty of tying this *patented* device to the relevant line of commerce here, the rebuilt Copeland compressor. The Courts repeatedly condemn the extension of a patent monopoly in such a tie-in fashion, both under the Sherman and Clayton Act. *E.g. International Salt vs. United States*, 332 U.S. 390 (1947).

2. Copeland's second attack is a claim that a tie-in between a trademark and other items never can constitute a *per se* violation. Both the Fifth Circuit in this case, and the Ninth Circuit have now rejected this contention. *Siegel vs. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), cert denied, 405 U.S. 955 (1972). The Second Circuit opinion relied upon by Petitioner was a split decision, *Susser vs. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964) cert dismissed, 381 U.S. 125 (1965).

Significantly the only area where a tie-in involving a trademark has ever been permitted, was in the fast food area. Even the majority in that one opinion, made it clear that a trademark tie-in would not be permitted in the machinery cases, where a trademark could easily be protected by describing certain specifications to be followed rather than specifying the brand or source of the tied products. (*Susser, supra*, 332 F.2d at 512, 520); *Accord E.g., International Salt vs. Unit-*

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ed States, 298 U.S. 131, 139-140 (1936); otherwise unlawful action cannot be justified with a trademark; *Timken Roller Bearing Co. vs. United States*, 341 U.S. 593 (1951), *Fontana Aviation vs. Beach Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970), cert denied 401 U.S. 923.

The fast food cases originally presented a distinguishing factor from machine cases. Now petitioner seeks to ignore this history and distinguish the fast foods cases by saying this case involves trademarked machines.

This Court rejected review of this question last year in *Siegel, supra*, where the issue was clearly the focus of attention of the 9th Circuit. The same action should occur here, especially since the real focus of this opinion is on proper method of submitting *per se* violations to the jury.

3. In focusing on the submission of the Court's charge, the Fifth Circuit first sets forth five separate sets of *per se* antitrust violations raised by Warriner, 463 F.2d at 1006, and then focuses its opinion on the method of proper submission of the *per se* antitrust violations to the jury:

> "... We focus our attention in this opinion upon the doctrinal accuracy of the trial judge's special interrogatories to the jury ..." 463 F.2d at 1007.

Almost as an example of one of the many *per se* violations raised by the evidence, the Court discussed the tie-in of the Copeland franchise to rebuilt compressors and parts manufactured by Copeland. *Ibid.*

Special Issue 3 contained a general proposition with separate subdivisions governed by the general proposition. (See Appendix A). Each subdivision required an answer. The general proposition required the jury to find if any of the facts in the subdivision existed and if they were an "unreasonable restraint of trade." The Fifth Circuit illustrated how this general section was a "rule of reason" inquiry rather than a "*per se*" inquiry, by looking at the tie-in covered by the indented subdivision (c) 463 F.2d at 1007. The Court at the end of the opinion specified that *per se* violations should be covered by only three inquires: (1) Did *per se* conduct occur; (2) Did it proximately injure Plaintiffs; and (3) What were Plaintiffs' damages. 463 F.2d at 1016.

The Court did not address specifically itself to the other *per se* violations. Obviously, even if the specific tie-in was for any reason not a *per se* violation, the case would still need to be remanded to the trial level because of the improper handling of the other *per se* violations raised in the case.

Special Issue 3(a) inquired whether fixing of wholesalers' or rebuilders' prices had occurred. This is a matter unquestionably of a *per se* nature. *United States* vs. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1937).

Special Issue 3(b) inquired whether Copeland's sales to its franchised wholesalers or rebuilders restricted those purchasers in their resale practices as to territories or customers, another *per se* type viola-

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tion clearly raised. *United States vs. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

Special Issue 3(c) included the issues discussed by the Court, but also included the tie-ins of patented Copeland compressors to rebuilt Copeland compressors; the tie-in of individual parts to kits, the tie-in of new patented compressors to parts, and the concerted refusals to deal with Warriner. These actions are clearly *per se* violations under either the Clayton or Sherman Acts. *International Salt vs. United States*, 332 U.S. 392 (1947); *Klor's, Inc. vs. Broadway-Hale Stores*, 359 U.S. 207 (1959).

The remand for new trial was thus clearly correct, regardless of the *per se* nature of the franchise tie-in to the rebuilt compressors, as the special issue erroneously submitted all of the *per se* violations raised by the evidence under the "rule of reason."

4. Respondent filed an extended brief below and raised twenty points of error. The Fifth Circuit only spoke to one of these points and held:

> " . . . Since we find the inquiry to the jury regarding *per se* Sherman Act violations on Copeland's part was prejudicial error, we do not address ourselves to the other questions discussed in the brief by the parties." 463 F.2d at 1016.

Each of the points raised below, independently warranted the remand. In addition to those already specified, briefly the others are as follows:

A. The Court's charge wrongfully required Plaintiffs to prove a Sherman Act violation to secure af-

firmative findings on a Clayton Act charge (Special Issue 3(c)), and wrongfully required Plaintiffs to establish economic effect on Interstate Commerce, when sufficient economic facts were stipulated. (Points of Error One & Five), *Fortner Enterprises vs. United States Steel Corp.*, 394 U.S. 495 (1969).

B. The Trial Court erred in refusing to submit the alleged conspiracy by Copeland and its rebuilders and wholesalers to prevent used compressors from reaching independent rebuilders, such as Warriner, under any theory (Point of Error Six). *Chicago Board of Trade vs. United States*, 246 U.S. 231 (1918).

C. The Trial Court erred in denying Warriner access to profit and loss statements of Copeland to demonstrate monopoly power, *Covey Oil Company vs. Continental Oil Company*, 340 F.2d 993 (10th Cir. 1965) and erred in denying Warriner access to refrigeration case manufacturers to demonstrate that Copeland possessed a monopoly in the commercial refrigeration compressor line of commerce (Points of Error Eight, Nine, Ten & Eleven).

D. The Trial Court erred when it excluded the following evidence:

(1) Any pre-damage period evidence of the formation of a conspiracy (Point of Error Twenty), *Continental Ore Company vs. Union Carbide Corp.*, 370 U.S. 690 (1962).

(2) Proof of Copeland's patents, to show Defendant's economic control over its franchisees (Point of Error Thirteen), *United States vs. Loew's, Inc.*, 371 U.S. 38, 45 (1962).

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(3) All statements made by franchisees outside Copeland's presence, regardless of the applicability of the co-conspirator's rule (Point of Error Twelve), *Schine Chain Theaters vs. United States*, 334 U.S. 110, 116 (1947).

E. The Court's charge was erroneous in each of the following respects:

(1) By instructing the jury they could consider the availability of other markets to Warriner (Point of Error Fifteen), *Fontana Aviation, Inc. vs. Beech Aircraft Corp.*, 432 F.2d 1080, 1087 (7th Cir. 1970), cert den. 401 U.S. 923.

(2) By informing the jury that the damages would be trebled (Point of Error Eighteen), *Webster Motor Car Company vs. Packard Motor Car Company*, 135 F.Supp 4 (D.D.C. 1955).

(3) By refusing to advise the jury that there may be more than one proximate cause of Warriner's damage, and that Copeland bore the burden of proving a more substantial cause than the antitrust violations (Point of Error Nineteen), *Perma Life Mufflers vs. International Parts*, 392 U.S. 135 (1968) (concurring opinion of Mr. Justice White).

F. The Trial Court deprived Warriner of procedural due process and its special venue rights by unilaterally transferring the case to the Dallas division (Point of Error Seven), *Swindell-Dressler Corp. vs. Dumbauld*, 308 F.2d 267 (Third Circuit 1968).

Each of these points individually justify remand to the trial level.

CONCLUSION

This case does not involve questions of national magnitude, but only the proper drafting of special jury charges, used almost exclusively in Texas. The example used by the Fifth Circuit to demonstrate its point was manifestly correct and this Court refused just last year to grant writ on this question, where it could have been easily reviewed without the myriad other factors which cloud this case. It is clear that the point Petitioner requests this Court to discuss, will have no effect on the Fifth Circuit's remand and would constitute purely an academic exercise.

Accordingly this writ should be denied.

Respectfully submitted,

HOOPER, KERRY, CHAPPELL
& BROILES

WINFRED HOOPER, JR.

DAVID F. CHAPPELL
200 Fort Worth Club Building
Fort Worth, Texas 76102

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APPENDIX A

Special Issue Number 3: Do you find from a preponderance of the evidence that defendant Copeland entered into any one or more of the following alleged contracts, combinations or conspiracies with non-defendant alleged co-conspirators hereinbefore named as Copeland "authorized" wholesalers and as Copeland "authorized rebuilders;" that such contracts, combinations or conspiracies constituted an unreasonable restraint of trade; and that either or both plaintiffs were injured in their business or property as a direct and proximate result thereof, vis.:

(a) with one or more of such Copeland "authorized" wholesalers or rebuilders to fix resale prices on Copeland's products, namely, new or rebuilt compressors or parts, sold to such wholesalers or rebuilders?

Answer _____

In connection with the foregoing issue, you are instructed that a manufacturer has a right to issue suggested resale price lists, which include suggested discounts, and to circulate them to its wholesalers, distributors, or rebuilders; and to encourage them to follow such suggested prices and discounts so long as there is no agreement or conspiracy between the manufacturer and its wholesalers, distributors, or rebuilders pursuant to which the wholesalers, distributors, or rebuilders are required to sell at the suggested prices.

(b) with one or more of such Copeland "author-

ized" wholesalers or rebuilders by which either the geographic areas within which said wholesalers or rebuilders might deal in new or rebuilt Copeland compressors or parts were limited or by which such "authorized" wholesalers or rebuilders were restricted as to customers to whom they might sell such Copeland products?

Answer _____

(c) with one or more of such Copeland "authorized" wholesalers or rebuilders in furtherance of which defendant, Copeland, sold or fixed a price charged on new or rebuilt Copeland compressors or parts on the condition, agreement or understanding that such "authorized" wholesalers or rebuilders not use or deal in the products of the plaintiffs, where the effect of such sale, condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce you have found?

Answer _____

(d) with one or more of such Copeland "authorized" wholesalers or rebuilders to refuse to deal in the products of the plaintiffs or to refuse to sell Copeland new or rebuilt compressors or parts to either of the plaintiffs?

Answer _____

(e) with one or more of such Copeland "authorized" wholesalers in furtherance of which defendant, Copeland, discriminated in price between purchasers of compressors of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce you have

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found, or to injure, destroy or prevent competition with Copeland or its authorized rebuilders?
Answer _____